

MANATT, PHELPS & PHILLIPS, LLP
RONALD S. KATZ (California Bar No. 085713)
E-mail: rkatz@manatt.com
RYAN S. HILBERT (California Bar No. 210549)
E-mail: rhilbert@manatt.com
1001 Page Mill Road, Building 2
Palo Alto, CA 94304-1006
Telephone: (650) 812-1300
Facsimile: (650) 213-0260

Attorneys for Defendant/Counterclaim and
Third-Party Plaintiff Maritz Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
SAN FRANCISCO DIVISION

VISA U.S.A. INC.,

Plaintiff/Counterclaim
Defendant,

v.

MARITZ INC., d/b/a MARITZ
LOYALTY MARKETING,

Defendant/Counterclaim
and Third-Party Plaintiff,

v.

CARLSON MARKETING GROUP, INC.

Third-Party Defendant.

CIVIL ACTION NO. C 07-5585 JSW

RESPONSE OF DEFENDANT/
COUNTERCLAIM PLAINTIFF MARITZ INC.
TO EVIDENTIARY OBJECTIONS OF
PLAINTIFF/COUNTERCLAIM DEFENDANT
VISA RELATING TO THE DECLARATIONS
OF MARK PETERMAN, KELVIN TAYLOR
AND DORIS LYONS

Defendant/Counterclaim Plaintiff Maritz Inc. (“Maritz”), for its responses to the objections of Plaintiff/Counterclaim Defendant Visa U.S.A., Inc. (“Visa”) to the Declarations of Mark Peterman, Kelvin Taylor and Doris Lyons, states as follows:

DECLARATION OF MARK PETERMAN

1. Evidence to Which Visa Objects: Paragraph 5 (2:24-3: 5): “More specifically, when I called Mr. Fordyce on July 20, 2007, I told him that we (Maritz) wanted to make sure that our expectations were set correctly for the meeting on July 24, that I wanted to confirm that he had our invoices and the detailed back-up to our invoices (relating to the approximately \$5.2 million that Maritz was owed), and to let him know that we would be prepared to discuss the invoices. He confirmed that he had our invoices and the back-up, and that was what they were coming to discuss. He indicated that Visa did not share our perspective as to the amount owed on the invoices, but never said anything indicating that Visa believed that Maritz should pay anything or that Maritz owed tens of millions of dollars. My clear understanding based on my conversation with Mr. Fordyce was that Visa was willing to pay Maritz something, but not the full amount that Maritz believed Visa owed.”

Maritz’s Response: The evidence is relevant; FRE 402. The evidence provides further support for Maritz’s position that Visa was concealing from Maritz that Visa never intended to pay Maritz any money and, instead, was claiming Maritz owed tens of millions of dollars.

In addition, this July 20, 2007 conversation is further relevant because it took place the day after Visa’s counsel Mr. Thompson sent Mr. Gallant a letter, dated July 19, 2007, in which Mr. Thompson enclosed Visa’s proposed “Alternative Dispute Resolution Protocol” (See Gallant Decl. ¶ 23, *see also* Exh. E to the Declaration of Ryan S. Hilbert in Support of Maritz’s Motion to Stay Arbitration (containing a copy of the July 19 letter and the proposed Protocol)). Visa’s July 19 proposed Protocol stated that “discovery should be minimized” and, more specifically, did not provide for any fact witness deposition discovery or any document requests. Visa’s proposed Protocol thus reflected a further effort by Visa to severely restrict Maritz’s rights at a time when Visa was still concealing its claim that Maritz owed tens of millions of dollars.

Mr. Gallant was out of the office on vacation and therefore did not review

Mr. Thompson's July 19 proposed Protocol until July 23, 2007. Upon reviewing the proposed Protocol, Mr. Gallant noticed it provided that "[e]ach Party claims the other should make a payment to resolve the dispute" (Gallant Decl. ¶¶ 23-25). That surprised Mr. Gallant and prompted him to follow up (*Id.*). Only then did Visa finally reveal it was claiming Maritz owed tens of millions of dollars (*Id.*). As a result, Mr. Gallant never signed Visa's Protocol.

2. Evidence to Which Visa Objects: Paragraph 7 (3:9-15): "I had had numerous discussions with Tad Fordyce and other Visa personnel in late 2006 through Visa's termination of the Agreement in the Spring of 2007. At no time had anyone from Visa told me that Visa believed or was claiming that Maritz owed Visa tens of millions of dollars or that liquidated damages were accruing. In fact, I knew in the first part of November 2006 that Visa had agreed to waive liquidated damages and that the parties had agreed, in light of the numerous problems, difficulties and delays encountered in connection with the Visa project, that Maritz was proceeding on a 'best efforts' basis."

Maritz's Response: Visa's objections should be overruled. The evidence is relevant in several respects and admissible under FRE 401 and 402. The evidence helps demonstrate why Maritz reasonably believed, prior to signing the July 9, 2007 letter, that Visa was not making claims against Maritz for tens of millions of dollars. The evidence is further relevant (a) because it suggests Visa was deliberately concealing this information from Maritz, and/or (b) in light of Mr. Gallant's Declaration in which he states that if such claims had been made by Visa, he would have been made aware of them (See Gallant Declaration, ¶ 36(a)).

Visa's remaining objections are also without merit. Mr. Peterman's Declaration establishes he was heavily involved in the Visa Extras Rewards Program project from approximately August 2006 until after Visa terminated the MSA in Spring of 2007. His statement that he "knew in the first part of November 2006 that Visa had agreed to waive liquidated damages and that the parties had agreed, in light of the numerous problems, difficulties and delays encountered with the Visa project, that Maritz was proceeding on a 'best efforts' basis," is tied into his statement in paragraph 6 of his Declaration that he "was very surprised" to learn on July 23, 2007 that Visa was claiming Maritz owed tens of millions of

dollars and is proper under FRE 701 and 704. There is no requirement that the Declaration contain the additional detail Visa seeks. Visa's objections go to the weight of the evidence rather than admissibility, and Visa can pursue additional detail through discovery.

DECLARATION OF KELVIN TAYLOR

1. Evidence to Which Visa Objects: Paragraph 5 (2:17-20): Visa has objected to the second sentence in Paragraph 5 of the Declaration of Kelvin Taylor. To put the evidence into proper perspective, set forth below are Paragraphs 4 and 5 of the Taylor Declaration:

“4. On July 23, 2007, I learned that Visa's lawyer, Rod Thompson, had told Steve Gallant of Maritz earlier that day that Visa was claiming Maritz owed Visa tens of millions of dollars. I was very surprised to hear this.

5. To my knowledge, no one from Visa had previously made any such claim. In addition, such a claim seemed inconsistent with the facts that (a) Visa and Maritz had been proceeding on a best efforts basis since at least the Fall of 2006 and (b) I understood in November of 2006 that Visa had agreed to waive liquidated damages under the Agreement.”

Maritz's Response: Visa's objections to the second sentence of paragraph 5 should be overruled. The evidence is relevant because it reflects the understanding of Mr. Taylor – who was then the President of Maritz Loyalty Marketing – that the parties had been proceeding on a best efforts basis since at least the Fall of 2006 and that Visa had agreed in November 2006 to waive liquidated damages under the Master Services Agreement. This, in turn, helps to show that Maritz reasonably believed, as of July 9, 2007 – when Visa was inducing Maritz into agreeing to arbitrate – that Visa was not and would not be claiming that Maritz owed Visa tens of millions of dollars and/or that liquidated damages had supposedly been accruing since the Fall of 2006.

Paragraph 5 of the Taylor Declaration, viewed in light of the other evidence contained in the Taylor Declaration, as well as in the Gallant, Lyons and Peterman Declarations, provides the factual backdrop indicating that Visa deliberately concealed that it would be seeking tens of millions of dollars from Maritz and/or claiming that liquidating damages were continuing to

1 accrue. Other evidence (if necessary) will show that Doris Lyons, the Chief Operating Officer
 2 of the Maritz Loyalty Marketing Division, advised Mr. Taylor on November 9, 2006 of the
 3 agreement with Visa to proceed on a best efforts basis and for Visa not to impose the penalty
 4 clause (i.e., the liquidated damage provision) as the parties had mutually agreed in the
 5 November 8-9, 2006 emails, thus corroborating Mr. Taylor's Declaration. Visa's objections go
 6 to the weight of the evidence rather than admissibility, and to the extent Visa wants additional
 7 detail, it can seek such information through discovery.

8 Mr. Taylor's statements are also proper under FRE 701 and 704.

9 **DECLARATION OF DORIS LYONS**

10 **1. Evidence to Which Visa Objects: Paragraph 2 (2:4-8):** "In the Fall of 2006,
 11 both I and others at Maritz had various discussions and communications with Visa relating to the
 12 Visa Extras Rewards Program project. One topic discussed was what the parties (i.e., Maritz and
 13 Visa) should do in light of the many difficulties, problems, and delays in connection with the
 14 project, including difficulties caused by Visa and its then-current vendor, Carlson Marketing
 15 ("Carlson")."

16 **Maritz's Response:** Visa's objections on foundational, FRE 104(b) and "vague and
 17 conclusory" grounds all go to the weight of the evidence rather than admissibility. There is no
 18 requirement that the Declaration contain the amount of detail that Visa seems to want, and Visa
 19 can seek the additional detail through discovery if it so chooses.

20 Ms. Lyons' statements are proper under FRE 401, 402 and 701; *see also* FRE 801(d)(2),
 21 803(1) and (3), 804(b)(3), and 807. It is not necessary for the Lyons Declaration to itemize each
 22 of the difficulties, problems and delays in connection with the Visa project.

23 **2. Evidence to Which Visa Objects: Paragraph 4 (2:13-22):**^{1/} "Maritz was
 24 concerned because of the many problems, delays and difficulties being encountered and made
 25 clear to Visa that Maritz would need assurances that Visa would not hold Maritz accountable if
 26 Maritz was going to continue to proceed under Visa's tight timeframe. Both I and others at

27 _____
 28 ^{1/} Although Visa indicates it objects to "Paragraph 4 (2: 13-22)" of the Lyons Declaration, Visa's objections appear to be limited only to Paragraph 4 (2: 13-17).

1 Maritz conveyed our concerns to (among others) Mr. Edward “Tad” Fordyce of Visa. Mr.
 2 Fordyce was a management-level Visa employee who was operating as a program manager for
 3 Visa with respect to Visa’s Rewards Program project. As set forth in Section VI.J. of the Master
 4 Services Agreement dated April 17, 2006 (the “Agreement”), Maritz was entitled to rely on
 5 communications from Mr. Fordyce with respect to the project, as well as from any of his superior
 6 officers (one of whom was Visa’s Tim Attinger). A copy of Section VI.J. of the Agreement is
 7 attached to my Declaration as Exhibit 1.”

8 **Maritz’s Response:** Each of Visa’s objections should be denied. Ms. Lyons’ statements
 9 are proper under FRE 401, 402 and 701; *see also* FRE 803(1) and (3), and 807. Visa’s
 10 objections go to the weight of the evidence rather than admissibility. There is no requirement
 11 that Maritz include in a written declaration the amount of detail that Visa claims is necessary.
 12 There is, for example, no requirement that the Lyons Declaration describe precisely how she
 13 conveyed certain concerns to Mr. Fordyce of Visa, or that she describe specifically what she said
 14 in her conversations with him. Visa can seek additional detail through discovery if it so chooses.

15 Visa’s “best evidence” objection is also without merit. Ms. Lyons’ Declaration is not
 16 purporting to summarize any particular document.

17 **3. Evidence to Which Visa Objects: Paragraph 5 (2:23-3: 2):** “As a result of
 18 Maritz’s concerns and the delays, problems and difficulties encountered in connection with the
 19 project, Maritz and Visa agreed on November 8-9, 2006, that the parties would proceed on a best
 20 efforts basis and that the penalty clause (i.e., the “liquidated damages” provision) of the parties’
 21 Agreement would not be imposed.... These emails reflect the parties’ agreement to proceed on a
 22 best efforts basis and that Visa waived its right to liquidated damages in connection with the
 23 parties’ Agreement.”

24 **Maritz’s Response:** Ms. Lyons’ statements in Paragraph 5 of her Declaration are
 25 proper. The Declaration need not lay out each and every fact upon which Ms. Lyons bases her
 26 statements, and her testimony is proper under FRE 701 and 704. If Visa wants to flesh out the
 27 underlying details, it should do so through discovery.
 28

1 Visa's objections also conveniently omit the reference to Exhibit 2 that is attached to the
2 Lyons Declaration. More specifically, Visa has omitted from its quotation of Paragraph 5 of the
3 Lyons Declaration the sentence that says "a true and accurate copy of the emails exchanged
4 between Mr. Fordyce and me dated November 8 and 9, 2006 are attached hereto as Exhibit 2."
5 The Lyons Declaration thus attaches the "best evidence" as Exhibit 2. Ms. Lyons is permitted to
6 testify as to both her understanding of the November 8-9, 2006 emails and the concerns, delays
7 and problems which resulted in the agreement contained in the November 8-9, 2006 emails. See
8 FRE 402, 701, 704, 801(d)(2), 803(1), 804(b)(3) and 807.

9 Respectfully submitted,

10 Dated: February 19, 2008

MANATT, PHELPS & PHILLIPS, LLP

11 By: /s/ Ryan S. Hilbert

12 Ronald S. Katz (SBN 085713)

13 Ryan S. Hilbert (SBN 210549)

MANATT, PHELPS & PHILLIPS, LLP

14 1001 Page Mill Road, Building 2

Palo Alto, CA 94304-1006

15 Telephone: (650) 812-1300

16 Facsimile: (650) 213-0260

Attorneys for Defendant and Counter-Claimant
MARITZ INC.